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No. 83 684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FLORENCE SMITH,
Petitioner,

v.

WILLIAM L. LUBBERS, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

1. What standard is the National Labor Relations Board required to meet in order to rebut a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act?

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Florence Smith respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 1, 1983, with rehearing denied on July 29, 1983.

OPINIONS BELOW

The order of the District Court (App. G) and memorandum of findings of fact and conclusions of law (App. F) are not reported. The judgment of the Court of Appeals (App. D) is not reported. The orders of the Court of Appeals denying the petition for rehearing (App. B) and suggestion for rehearing *en banc* (App. A) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied July 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in executive agencies (other than General Accounting Office) as defined in section 105 of title 5 * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 15(a) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a provides in pertinent part:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * in executive agencies * * * shall be made free any discrimination based on age.

STATEMENT

Petitioner entered employment with the National Labor Relations Board (NLRB) in 1973 in the Legal Research Branch, Division of Advice, as a recent law school graduate over age 40. Beginning in 1974, Petitioner applied for lateral transfers to other offices of the NLRB where there would be opportunities for promotion. She followed the required procedure of placing her name on transfer registers for other Washington offices and field offices.

The agency has no written standards for selection and has a policy of not announcing the vacant positions and of not notfying the unsuccessful candidates of their rejection.

Between 1976 and 1980, Petitioner discussed her desire for a transfer in several meetings with Deputy General Counsel John E. Higgins, Jr., and as recently as the spring of 1980 Higgins told her that she was being considered for a lateral transfer to a field posiiton.[1] On December 15, 1980, Pctitioner filed an informal complaint with an EEO Counselor. On January 12, 1981, Petitioner filed a formal administrative complaint alleging sex and age discrimination by the NLRB's refusal to transfer her to a field position.

In May 1981, an opening for a lateral transfer to a field position became available and the NLRB selected Louella Nelson, a woman under 40, for that position. The district court found that Petitioner established a *prima facie* case of age discrimination (App. F, *infra*, 34a).[2] The court explicitly found that the NLRB gave no reason for rejecting Petitioner for the Nelson position.[3] However, the NLRB "produced evidence" of sub-

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[1] Higgins stated that he functions as the *alter ego* of the General Counsel. Tr., III-B, 8.

[2] It is undisputed that Petitioner met the minimum qualifications for a lateral transfer to the twenty-three field positions that were in issue in the courts below. Moreover, in 1980 Petitioner was rated "qualified" for a promotion to supervisory field positions.

[3] During discovery, the NLRB stated that Petitioner was rejected for twenty-three lateral transfers between 1975 and 1981, and the Nelson position was incuded in this list. The court made no finding that the NLRB articulated a legitimate nondiscriminatory reason for rejecting Petitioner for any of these positions. The court committed errors in its findings of fact and failed to make several relevant findings. For example, Stack stated that he did not consider Petitioner for eight positions although he

jective supervisory appraisals of Nelson and Petitioner and the court, after reviewing these exhibits, found that Nelson's appraisals were "clearly superior to plaintiff's." Finding of Fact 33. *Id.* at 28a. The court concluded that Petitioner was rejected for this position because Nelson was better qualified than Petitioner. *Id.* There is no evidence in the record to support a finding that this was, in fact, a reason for the NLRB's decision.

This reason for Petitioner's rejection was articulated for the first time in the court's opinion and Petitioner, therefore, had no opportunity to demonstrate at trial that this reason was a pretext for discrimination. Additionally, the court found that Petitioner did not establish a *prima facie* case of sex discrimination under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas v. Green Corp., supra*, holding that a woman may not establish a sex discrimination claim for a position awarded to another woman. *Id.* at 32, n. 17. The court did not consider the fact that this position was filled by a woman after Petitioner filed her administrative complaint alleging discrimination on the basis of both sex and age and that this rejection was but one more rejection in a long series of rejections for similar positions.

On appeal, Petitioner contended that the district court did not apply the *McDonnell Douglas-Burdine* standard of proof because the NLRB gave no reason for the selection of Nelson and, therefore, did not rebut the *prima facie* case for that position.

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told Petitioner that he would consider her. The court did not address this issue.

The Equal Employment Opportunity Commission (EEOC) never investigated this case. It may not investigate the claim of a federal employee until after the federal agency completes its internal investigation and issues a final agency decision; an agency has no time target to meet. The NLRB issued its decision after Petitioner filed this action in the district court.

In its brief on appeal, the government did not rely on the *McDonnell Douglas-Burdine* standard and, at oral argument, it contended that the NLRB met its rebuttal burden by the totality of the evidence in the record. The government cited no authority for this position.

The Court of Appeals affirmed the lower court's decision expressly relying on the Findings of Fact, the Conclusions of Law, and the reasoning of the district court.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE EMPLOYER'S BURDEN IN REBUTTING A PRIMA FACIE CASE OF DISPARATE TREATMENT

The basic issue raised by this case, how a defendant may meet its burden of rebuttal after a *prima facie* case of disparate treatment has been established, was set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court held that "[t]he burden must then shift to the employer to articulate some legitimate nondiscriminatory reason for the employee's rejection." *Id.* at 802. The district court specifically found that the NLRB articulated no reason for rejecting Petitioner for the Nelson position, yet concluded that the NLRB rebutted the *prima facie* case for that position.

In *Miller v. WFLI Radio Incorporated*, 687 F.2d 136 (6th Cir. 1982), the Court of Appeals for the Sixth Circuit held that the Magistrate clearly erred in drawing an inference of a legitimate nondiscriminatory reason other than those advanced by the defendant. The Magistrate found that the reasons given by the defendant were specious but concluded that plaintiff had not sustained her burden of proof. The magistrate than devised a reason from the record, that the defendant had a preference for another employee. *Id.* at 138.

In *Lanphear v. Prokop* [Merit Systems Protection Board], 703 F.2d 1311 (D.C. Cir. 1983), a reverse discrimination case, the Court of Appeals for the District of Columbia Circuit held that the district court clearly erred in devising a reason not relied upon by the selecting official, that the MSPB "wanted new faces and they wanted to remove most of the incumbents." *Id.* at 1314. The district court rejected the defendant's reason, that the plaintiff performed poorly during a previous assignment to the position at issue, because the plaintiff demonstrated during the trial that this reason was a pretext for discrimination. He had been alerted to this reason for his rejection during the agency's investigation of his administrative complaint.

In *Paxton v. Union National Bank*, 688 F.2d 552 (8th Cir. 1982), cert. denied, —— U.S. ——, 103 S.Ct. 1772 (1973), the Court of Appeals for the Eighth Circuit held that the defendant could not assert as a defense the reason that the selectee was "better qualified" without explaining more fully the reason for that conclusion. *Id.* at 569.

In *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88 (6th Cir. 1982), the Court of Appeals for the Sixth Circuit held that the defendant did not meet its burden because the record did not disclose the specific reasons for the foreman's refusal to rehire an employee. The district court made reference to evidence that the employee had been admonished to stay at his work station. However, the court of appeals held that this reason could have been a viable reason but there was no evidence in the record that such reason was, in fact, the foreman's reason for his employment decision. *Id.* at 96-97.

The above cases demonstrate that courts of appeals have consistently reversed the trial courts when those courts have based their findings of no discrimination on reasons that were not articulated by the employer. Re-

search has disclosed no case in which a lower court has permitted a defendant to meet its rebuttal burden without articulating some reason for its decision. In the instant case, the district court did not apply the *McDonnell Douglas* rule because it explicitly found that the NLRB gave no reason for rejecting Petitioner for the Nelson position yet found that the NLRB met its rebuttal burden. The court examined supervisory appraisals of Nelson and Petitioner and gleamed the reason that Petitioner was rejected because Nelson had a superior record. (App. F, *infra*, at 28a.)

The courts below have misapplied *McDonnell Douglas* because they have concluded that the defendant does not have to articulate a reason for its decision so long as there is evidence in the record from which the court can devise some reason that will serve as an agency defense. Thus, the District of Columbia Circuit will permit the defendant to submit raw files to the court and under the guise of "totality of evidence in the record" allow the district court to review those files and articulate a reason for an agency decision.

Certiorari is required so that this new defense that the government has devised for disparate treatment cases can be put to rest promptly, and in order to enforce obedience to the settled law of this Court so that the federal employer shall be required to conform to the same rules in employment discrimination cases that are required of all other employers. "The federal government . . . is a model for all and exercises a significant educational force by its example." *Hackley v. Roudebush*, 520 F.2d 108, 136 (D.C. Cir. 1975).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, and summarily reverse the judgment below.[4]

Respectfully submitted,

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Bethesda, Md. 20816
(202) 254-9438

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[4] In the alternative, the Court may wish to consider this case in light of its grant of certiorari in *Vaughn v. Westinghouse Electric Corp.*, 702 F.2d 137 (8th Cir. 1983), *cert. granted*, October 17, 1983, —— U.S.L.W. —— (No. 82-2042).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 81-01747

No. 82-2138

FLORENCE SMITH,
Appellant

v.

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board,
Appellee

And Consolidated Case No. 83-1005

[Filed Jul. 29, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges; and Richey *, District Judge, U.S. District Court for the District of Columbia

ORDER

The Suggestion for Rehearing en banc of Appellant, filed July 18, 1983 has been circulated to the full Court

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc*, that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 81-01747

No. 82-2138

FLORENCE SMITH,
Appellant

v.

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board,
Appellee

And Consolidated Case No. 83-1005

[Filed Jul. 29, 1983]

Before: Tamm and Bork, Circuit Judges; and Richey *, District Judge, U.S. District Court for the District of Columbia

ORDER

On consideration of the Petition for Rehearing of Appellant filed July 18, 1983, it is

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Daniel M. Cathey
DANIEL M. CATHEY
First Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. 20001

June 1, 1983

GEORGE A. FISHER
Clerk

Re: 82-2138 & 83-1005—Florence Smith v. William A. Lubbers, General Counsel NLRB

Dear Counsel:

I am enclosing herewith a copy of the judgment of this Court entered today in the above entitled case.

Yours,

CHRISTINE M. SMITH
Opinions Clerk

Enclosure
Distribution:

Florence Lewis Smith
U.S. Attorneys' Office

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 81-01747

No. 82-2138

FLORENCE SMITH,

Appellant

v.

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board

No. 83-1005

FLORENCE SMITH,

Appellant

v.

CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

[Filed Jun. 1, 1983]

Appeals from the United States District Court
for the District of Columbia

Before: Tamm and Bork, Circuit Judges, and Richey,* Judge, United States District Court for the District of Columbia

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were briefed and argued by the parties. While the issues presented have been accorded full consideration by the court, they occasion no need for an opinion. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed for the reasons stated in the opinion of Judge Gasch dated July 30, 1982. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1747

FLORENCE SMITH,

Plaintiff,

v.

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board,

Defendant.

[Filed Dec. 14, 1982]

MEMORANDUM-ORDER

Now pending before the Court are plaintiff's two motions for relief from judgment on the ground of fraud pursuant to Rule 60 of the Federal Rules of Civil Procedure (FRCP). Because both of these motions rest upon the same grounds, the Court deals with both motions together. After careful consideration of plaintiff's motions, and defendant's opposition thereto, the Court concludes that plaintiff has failed to demonstrate sufficient justification to the Court which would warrant the relief sought.

BACKGROUND

Plaintiff, Florence L. Smith, in her complaint, filed herein on July 27, 1981, alleged that she had been discriminated against on the basis of age and sex by de-

fendant, the National Labor Relations Board (NLRB). Seeking relief pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 633a, *amended by* Pub. L. 95-256 (April 6, 1978) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5, 2000e-16, plaintiff alleged discrimination based upon defendant's failure to promote her and to transfer her to a regional field office. Trial to the bench was held on March 8 to 11, 1982 and concluded on May 24, 1982.[1] On July 30, 1982, the Court entered judgment for defendant. On August 17, 1982, plaintiff moved for a new trial based upon newly discovered evidence. Such motion was denied on November 1, 1982. On November 9, 1982, plaintiff moved for relief from judgment pursuant to FRCP 60(b)(1) and (b)(3) based upon the alleged perjury of one of defendant's witnesses, Supervisory Attorney Leonard Bernstein. Defendant filed its opposition thereto on November 22, 1982. Before the Court could consider the motion, plaintiff, on November 26, 1982, again moved for relief from judgment on the same grounds based upon the alleged perjury of another of defendant's witnesses, Supervisor Joseph Rosenthal. Defendant filed its opposition to this motion on December 6, 1982. The Court now focuses upon the two motions.

Rule 60(b)(1) and (b)(3)

Rule 60(b) of the Federal Rules of Civil Procedure provides (in pertinent part):

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excludable neglect;
>
> . . .

[1] Completion of the trial was delayed by the sudden illness of one of defendant's witnesses.

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Plaintiff alleges with regard to both motions that: (1) the allegedly perjurious testimony of both witnesses constituted surprise testimony; and (2) that such allegedly perjurious testimony constitutes fraud on the part of defendant. The Court hereinafter examines plaintiff's motions as to each of the grounds asserted.

A. *Rule 60(b)(1)—Surprise*

1. *Testimony of Leonard Bernstein*

Plaintiff alleges that the testimony of her Supervisory Attorney, Mr. Leonard Bernstein, "constituted surprise testimony as it was not revealed in any pleading or in the Investigative Report prepared by the NLRB." She further supports this allegation with the fact that until the first day of trial, Mr. Bernstein was to be her witness. It is well established in this circuit that in order to establish that the testimony of a witness was a surprise, a foundation must first be established (generally through proffer of a prior inconsistent statement) demonstrating true surprise. *See Troublefield v. United States*, 372 F.2d 912, 915 (D.C. Cir. 1969). Plaintiff in the instant case fails in this regard to establish a foundation beyond the bare allegation that Mr. Bernstein's testimony was a surprise. In fact, after reviewing the testimony of Mr. Bernstein, the Court fails to see how plaintiff was surprised by his testimony.[2] The Court accordingly concludes that plaintiff has failed to establish surprise in the testimony of Mr. Bernstein.

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[2] The gist of Mr. Bernstein's testimony was that he was satisfied with plaintiff's work on the administrative case she was involved in. *See Transcript*, Vol. III-B, pp. 1-11.

2. *Testimony of Joseph Rosenthal*

Again plaintiff asserts that because the gist of Mr. Rosenthal's testimony was not revealed in the Investigative Report prepared by defendant or in the pleadings, such testimony was a surprise. For the same reasons that plaintiff's allegation of surprise in the testimony of Mr. Bernstein was rejected, the Court rejects plaintiffs' allegation of surprise in the testimony of Mr. Rosenthal.

B. *Rule 60(b)(3)—Fraud*

With regard to plaintiff's allegation of fraud on the part of defendant in the alleged perjurious testimony of both Mr. Bernstein and Mr. Rosenthal, the Court feels that because the nature and strength of these allegations are similar, these allegations are appropriately dealt with together.

The Court finds the language of Judge Brennan (now Justice of the Supreme Court) of the Supreme Court of New Jersey in *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952), dispositive of Ms. Smith's allegations of perjury:

> Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief.

Id., 88 A.2d at 208-09 (citations omitted); *accord Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339, *reh. den.*, 578

F.2d 871 (5th Cir. 1978); *see also Wilkin v. Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973); *DiVito v. Fidelity & Deposit Co. of Md.*, 361 F.2d 936 (7th Cir. 1966). While the case in point involved the New Jersey rule of procedure governing relief from judgment, that rule is virtually identical to FRCP 60. *Compare* FRCP 60 *with Shammas, supra*, 88 A.2d at 207. In the instant case, plaintiff's proffered evidence fails to establish that Mr. Rosenthal's testimony was knowingly falsely given. Further, Mr. Rosenthal's report concerning plaintiff's performance, in his regional office was not the only unfavorable report regarding plaintiff's work, and as such, is merely cumulative. Finally, the hiatus in the trial of more than two months caused by the sudden illness of one of defendant's witnesses certainly afforded plaintiff an opportunity to discover through reasonable diligence the alleged falsity of Mr. Rosenthal's testimony in time to offset its effect at trial. This plaintiff failed to do.

With regard to the testimony of Mr. Bernstein, the analysis above is equally applicable. In addition, after thoroughly reviewing the testimony of Mr. Bernstein and the proffered affidavit of Mrs. Shevchuck, the Court is unpersuaded that Mr. Bernstein's testimony was false in any way. With regard to Mr. Bernstein's statement that plaintiff had not seen any witnesses alone, it must be noted that the question to which the witness was responding was prefaced by: "To the best of your knowledge . . . ." At best, plaintiff's proffered evidence establishes that Mr. Bernstein had no knowledge of any solo interviews conducted by Ms. Smith. Finally, plaintiff has proffered no evidence whatsoever that defendant suborned the alleged perjury of either witness.

CONCLUSION

After carefully reviewing plaintiff's motions, the memoranda in support thereof and in opposition thereto, and

the entire record herein, the Court is of the opinion that plaintiff is seeking to relitigate her claims. Therefore, her motion is denied. *Mastini v. American Telephone and Telegraph Co.*, 369 F.2d 378 (2d Cir. 1966), *cert. denied*, 387 U.S. 933 (1967). Accordingly, it is by the Court this 13th day of December, 1982,

ORDERED that plaintiff's motion for relief from judgment on the ground of fraud of Supervisory Attorney Leonard Bernstein be, and hereby is, denied; and it is further

ORDERED that plaintiff's motion for relief from judgment on the ground of fraud of Supervisor Joseph Rosenthal be, and hereby is, denied.

/s/ Oliver Gasch
Judge
[OLIVER GASCH]

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1747

FLORENCE C. SMITH,
Plaintiff,

v.

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board,
Defendant.

[Filed Jul. 30, 1982]

MEMORANDUM

The plaintiff in this case alleges that the General Counsel's Office of the National Labor Relations Board (NLRB) has discriminated against her on the basis of sex under 42 U.S.C. § 2000e-16 and on the basis of age under 29 U.S.C. § 633a by refusing or failing to transfer her to regional field offices and by failing to promote her to GS-14 following transfer. Trial to the Court was held on March 8-11, 1982 and concluded on May 25, 1982.[1] Accordingly, the Court, pursuant to Fed. R. Civ. P. 52(a), issues the following findings of fact and conclusions of law.

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[1] Completion of the trial was delayed by the sudden illness of one of defendant's witnesses.

FINDINGS OF FACT

1. Plaintiff Florence L. Smith is a female citizen of the United States and a resident of Maryland. Stip. ¶ 1.[2] She is currently employed as a GS-13 attorney in the Legal Research and Policy Planning Branch, Division of Advice, (LR) Office of the General Counsel NLRB. *Id.* ¶ 4.

2. The NLRB is an agency of the federal government, and the General Counsel is a separate autonomous office with the NLRB. The General Counsel is a named defendant in his official capacity as the head of a separate independent office. *Id.* ¶ 2.

Plaintiff's Career at NLRB

3. On July 30, 1973, the plaintiff, then a recent law school graduate and 49 years of age, was hired at the GS-9 level by the office of General Counsel.[3] Stip. ¶¶ 3, 6; Plaintiff's Exh. 65. She was assigned to LR at that time. Stip. ¶ 9.

4. Plaintiff advanced to grades 11, 12, and 13 at the standard rate of progression for NLRB attorneys. Stip. ¶ 3. During the period 1973 through the middle of 1977, plaintiff received a number of evaluations of her work in LR and of her detail to Board Chairman Murphy's staff. These evaluations ranged from above average to excellent. Plaintiff's Exh. 27, 29, 30, 32, 33, 34; Trans. Vol. I, at 10 (Smith).[4] In January 1976, plaintiff received a

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[2] Facts stipulated to at the pretrial conference are referenced as "Stip." and by paragraph number.

[3] The parties have stipulated that GS-9 is the normal entry grade for NLRB attorneys. Stip. ¶ 3.

[4] Citations to trial testimony are given by volume and page with the name of the witness in parentheses. The parties only ordered transcriptions of portions of the trial testimony. References to untranscribed testimony is made by the name of the witness.

Certificate of Commendation and a within-grade salary increase as a result of "the high level of effectiveness" demonstrated by her work in LR. Plaintiff's Exh. 66, 67.

5. At some point in 1975 or 1976, after plaintiff had been in LR for over two years, she began to express a desire for a transfer.[5] Plaintiff made an appointment with John Higgins, Deputy General Counsel to discuss her desire. Trans. Vol. I, at 16-17 (Smith). Higgins advised plaintiff that it was not true that she would never be transferred from LR. Stip. ¶ 9.

6. In the summer of 1977, the plaintiff was given a detail to the Advice Branch, where she worked under the immediate supervision of Peter Mirsky and Catherine Goldman and under the general supervision of Jane Clark. Stip. ¶ 10; Trans. Vol. I-A, at 7-9 (Datz). At the conclusion of this detail in the fall of 1977, plaintiff's supervisors in the Advice Branch recommended that the detail not be converted into a permanent transfer because she lacked the analytical ability essential to success in

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[5] Plaintiff's testimony recited a number of instances where certain persons had made promises to her or had made certain outrageous statements to her. In most instances the person to whom the promise or statement was attributed denied having made the statement. For instance, Smith testified that her supervisor Bronia Walsh stated that management had promised that Smith would not be transferred out of LR, a statement denied by Walsh (in a portion of testimony not transcribed) and belied by subsequent events. The only statement not rebutted by defendant was that attributed to Mr. Anderson, who allegedly had promised Smith a transfer after two years in LR and who had died before trial. The Court finds plaintiff's testimony on these points to be scarcely credible. The persistent denials of defendant's witnesses and plaintiff's demeanor on the witness stand suggests to the Court that John Higgins' experience with Mrs. Smith's memory of events was correct—statements that certain contingencies *might* take place were interpreted by the plaintiff to be promises that these contingencies *would* take place. *See* Trans. Vol. III-B, at 23 (Higgins).

that branch. Trans. Vol. I-A, at 11 (Datz); Defendant's Exh. G, H. Plaintiff has not accused either Goldman or Clark of discrimination, and her testimony about Peter Mirsky was not persuasive.[6] *See* Trans. Vol. IV, at 24 (Smith).

7. Plaintiff returned to LR where she continued to work until spring of 1978. During this period she continued to do Advice cases on an ad hoc basis. Trans. Vol. I-A, at 12 (Datz).

8. From May 1978 to February 1979, Smith was detailed to the Appellate Court Branch, Division of Enforcement Litigation. This division of the NLRB handles litigation before the United States Court of Appeals and the Supreme Court. Smith's supervisors were John Elligers, Elliot Moore, Paul Spielberg, and Janet McCaa. Stip. ¶ 11.

9. While plaintiff was on this detail, she received her annual evaluation from her LR supervisors for the period July 1977 to July 1978. These evaluations, written by Herbert Weiser and Standau Weinbrecht, both rated plaintiff not recommended for promotion. *See* Defendant's Exh. I, J. The Weiser evaluation pointed out that Smith at times overlooked or improperly classified major issues

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[6] At trial plaintiff admitted that she had alleged that only Higgins had discriminated against her. Trans. Vol. IV, at 31 (Smith). Plaintiff did make certain vague accusations about Mirsky's motivation in giving her a bad evaluation. Trans. Vol. I, at 91-92. *See* Defendant's Exh. G (Mirsky evaluation of plaintiff). In particular plaintiff claimed that Mirsky became hostile and difficult to deal with after he learned that he had not been selected for a promotion. This contention is not grounds for a discrimination complaint; moreover, there was evidence that Mirsky had found problems in plaintiff's work prior to the date of his alleged discontent. *See* Defendant's Exh. FF. Although plaintiff claimed not to have seen the Mirsky evaluation until later, it is clear that he discussed his problems with her work. Trans. Vol. I, at 91-92; Vol. IV, at 24 (Smith).

in her LR work but that she had helped the branch get rid of its backlog by doing more work than was normally required. Defendant's Exh. I. However, the evaluation focused on a statistical survey Smith and compiled on her own initiative to demonstrate that she was doing more work than other LR attorneys. *Id.* This survey, because it implied that other workers were not doing their fair share of the work, had evidently caused morale problems in the branch. *See* Defendant's Exh. J, at 2. This incident and plaintiff's negative attitude toward LR work led to the Weiser recommendation. Defendant's Exh. I. Weinbrecht concurred in the Weiser evaluation and pointed out that the survey incident was merely one in a series of incidents caused by Smith's "competitive spirit." Defendant's Exh. J. To Weinbrecht, these incidents cast doubt on Smith's potential as a supervisor. *Id.* The Weinbrecht and Weiser evaluations were overruled by Harold Datz. Defendant's Exh. K. He based his decision, not upon disagreement with Weiser and Weinbrecht's feeling that Smith's survey was "improper," but out of an awareness of her frustration with LR work, her recent illness, and her lack of success in obtaining a transfer. He did not believe that there was anything to suggest that the Weiser and Weinbrecht evaluations were motivated by malice or in retaliation for Smith's complaints about the lack of work in LR.[7] Defendant's Exh. K; Trans. Vol. I-A, at 15-18 (Datz).

10. The detail to Enforcement did not result in a transfer because Smith's supervisors were not satisfied

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[7] The Weiser and Weinbrecht evaluations were retained in Smith's personnel files. Although plaintiff contends the Court should order their removal, nothing suggests that these evaluations were retaliation for EEO complaints by Smith or otherwise motivated by discriminatory animus. *See* Trans. Vol. I-A, at 15 (Datz). Moreover, it appears to be the practice of the NLRB to retain such evaluations. *Id.* Vol. II-A at 29 (Datz). Because the evaluations had nothing to do with discrimination, the Court will not order their removal. *See infra* pp. 27-28.

with the way she was doing her work. Trans. Vol. I-A, at 19 (Datz). This was the opinion of Schumann and Moore whose testimony was not transcribed. She also worked on several enforcement briefs and, her appraisal by Paul J. Spielberg was "satisfactory" although he noted: "[S]he ran into trouble . . . devising and executing an effective approach to the specific problems of each case," and pointed out some problems with her legal writing ability. Plaintiff's Exh. 13. An evaluation of another written brief by Smith was mixed. Defendant's Exh. L. Plaintiff has not claimed that these officials discriminated against her.

11. When plaintiff's detail to Enforcement came to an end, Datz decided that reassignment to LR was not in her best interests. Trans. Vol. I-A, at 19 (Datz). Consequently, he tried to arrange a field assignment for her. Trans. Vol. I, at 21 (Smith); Trans. Vol. I-A, at 19-20 (Datz). However, because of the mixed evidence of Smith's performance, an interview was set up for her with Gerald Kobell, Assistant General Counsel of the NLRB. Trans. Vol II, at 10 (Kobell). Kobell aptly described the motivation for the interview: "on the one hand we had appraisals from the Legal Research Branch, which were somewhat favorable. She had done fairly well there. On the other hand, she had been on detail in Advice, and the appraisals were not favorable . . . and Mr. Eugene Rosenfeld, my lead superior . . . decided that the best course of action would be for one of us to interview Florence, to get a firsthand view of her ability . . . . *Id.* at 10-11.

12. In this interview, Kobell gave Smith a hypothetical case and asked her for her analysis and recommendations. Trans. Vol. II, at 12 (Kobell). Although Kobell gave Smith a fairly simple fact pattern, she did not do very well. *Id.* She did not point out which witnesses should be questioned, and she was unable to recommend a result. *Id.* at 13-21. Kobell found her performance to

be "substandard," *id.* at 20, and was surprised, in view of her experience with the NLRB, that her legal analysis of the elements of the case did not even compare favorably with that of new applicants. *Id.* at 20-21. Kobell memorialized his views of the shortcomings of Smith's performance in a memorandum, Defendant's Exh. Q, which stated:

> I concluded that she does not have good potential to develop into a skilled investigator or that she will perform well in the litigation of an unfair labor practice case before an Administrative Law Judge. She did not display the ability to elicit facts, to follow up leads, and to explore avenues which would be of assistance in determining whether a conclusion was supported by appropriate evidence.

Id.[8]

13. Despite Kobell's generally unfavorable evaluation of plaintiff's potential for field work, she was eventually detailed to the Philadelphia Regional Office. This detail lasted from March through May 1979, and plaintiff was supervised by Joseph Rosenthal and Francis Hoeber. Stip. ¶ 13. The appraisals of plaintiff's work during this detail were mixed. Her excellent attitude and willingness to work were unquestioned, but her legal writing and analysis were not up to the level usually required for field work. Plaintiff's Exh. 14, 15. Plaintiff did not claim that any of the NLRB officials involved in the detail had

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[8] Smith claimed that during the interview Kobell told her: "I don't think a woman your age should be doing field work." Trans. Vol. I, at 22 (Smith). Kobell denied making this statement, Trans. Vol. II, at 22 (Kobell), and pointed out that he had hired women over forty for several field jobs. *Id.* at 22-24. The Court does not credit plaintiff's testimony but notes that had the statement been made, plaintiff should have reported it to an EEO Counselor at the time rather than waiting several years to bring it up. *See infra* pp. 18-21 (discussing plaintiff's continuing discrimination allegations).

discriminated against her. Trans. Vol. I, at 208, 233. The detail did not become a permanent transfer.

When Smith returned to Washington she was able on her own initiative to get a detail to the Office of Representation Appeals. Stip., ¶ 14; Trans. Vol. I, at 26 (Smith). All appraisals of Smith's work during this detail were generally favorable in their discussion of her attitude and willingness to work, Plaintiff's Exh. 16, 17, 18, but two evaluations also pointed out that she had problems with legal writing and analysis. Plaintiff's Exh. 16, 17.

15. At the end of plaintiff's detail to the Office of Representation Appeals, she went to see Datz to inquire whether he would allow her to have a detail on the staff of Board member Jenkins. Trans. Vol. II-A, at 4 (Datz). Datz had no objections, and the detail began in December of 1979.

16. Datz arranged to have the detail to Board member Jenkins become a transfer in May 1980. He took this action because in March 1980 the union that represented the attorneys in LR filed a grievance. Trans. Vol. II-A, at 4 (Datz). The attorneys in LR were complaining because Datz had allowed plaintiff to go on numerous details while the other LR attorneys were left to carry on the work of the Branch without her. Indeed, the LR attorneys claimed that a backlog of cases had arisen, in part at least because Smith was on detail. *Id.* at 4-6; Defendant's Exh. Z. To placate the union Datz made an effort to have Advice Branch cases made available to LR attorneys and tried to have Smith's detail made permanent. Trans. Vol. II-A, at 6-7 (Datz). Datz met with Smith and told her that she would be transferred to Jenkin's staff and that if, after six months, her work was satisfactory, she would be allowed to stay there. *Id.* at 7. If her work did not satisfy the other members of Jenkins' staff, she would be transferred back to LR. Datz also

told her that this transfer was the last of his special efforts to get noncontractual details for Smith.[9] *Id.*

17. In September of 1980, Datz was informed by a Mr. Leet of Jenkins' staff that Smith's transfer was not working out satisfactorily. Trans. Vol. II-A, at 9 (Datz). Datz met on September 18 with Smith and Deputy General Counsel Higgins to discuss the situation and her pending request for a transfer to the Fort Worth office. Smith was informed that, pursuant to the terms which changed her detail into a transfer, she would be transferred back to LR. *Id.;* Trans. Vol. III-B, at 12 (Higgins). At first Smith did not remember the agreement, but she later admitted the gist of the previous conversation. Trans. Vol. III-B, at 12.

18. On October 26, 1980, Smith was transferred back to LR where she remains today. Stip. ¶ 16.

19. Subsequent to the September 18, 1980 meeting, plaintiff retained counsel in the person of a Mr. Curtin, who arranged an appointment to speak with Higgins. Trans. Vol. III-E, at 20 (Higgins). In preparation for this meeting Higgins asked Datz to prepare a summary of Smith's employment history with the NLRB. *Id.*; Trans. Vol. II-A at 20 (Datz). This summary consisted mainly of negative comments abstracted from evaluations of Smith's work. Trans. Vol. II-A, at 20 (Datz); Plaintiff's Exh. 11. Although this memorandum was not originally intended to be placed in Smith's appraisal file, it was eventually found there. Trans. Vol. III-B, at 21

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[9] The NLRB's contract with the union requires that approximately 20 details of attorneys be made each year. Most of Smith's details were above and beyond the contract requirements. Indeed, the number of details Smith made are a tribute to two things: 1) Smith's persistence in trying to get a transfer and 2) Datz' extraordinary efforts to find an office outside of LR that would have her. He made this effort, which appears to go far beyond his efforts on behalf of any other employee, despite the fact that her performance outside of LR was average at best.

(Higgins). At the meeting with Curtin, Higgins indicated that he would not give a time frame within which plaintiff would receive further consideration for a transfer because he feared such an indication would be interpreted as a promise. He would, however, not foreclose the possibility that Smith might get a transfer to a field office at some time in the future. *Id.* at 22-23.

20. Plaintiff did not file an informal complaint of discrimination until December 15, 1980, a short time after Curtin's discussion with Higgins.

21. To summarize plaintiff's career at NLRB, it is clear that in her early years she did an excellent job and received excellent appraisals but that she was unsuccessful in gaining a transfer because she lacked certain legal skills. This deficiency was a persistent refrain in the testimony at trial and is reflected in various appraisals of her work.[10] After a time plaintiff's frustration at not getting a transfer even caused her work at LR to fall below its former exemplary standard.

The Transfers and Promotions

22. Since at least 1972, the collective bargaining agreements covering employees of the General Counsel's Office of the NLRB have included provisions governing transfer from headquarters to field offices. The contracts provide

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[10] This view of plaintiff's work remains even if one does not consider those evaluations—Weiser, Weinbrecht, Clark, and Mirsky—whose regularity plaintiff challenges. The only consistently positive appraisal of plaintiff for work done outside LR was that by Donald Salins. Plaintiff's Exh. 18. Other appraisals, though praising her attitude, found her work to be less than outstanding or pointed out her problems with legal analysis. *See* Plaintiff's Exh. 13, 14, 15, 16, 17, 26. In particular, the Court was impressed by the evaluation of plaintiff written by Datz. Plaintiff's Exh. 87. Datz was a particularly credible witness, and his evaluation summarizes the persistent problems with Smith's work. She does not claim that Datz discriminated against her. Trans. Vol. I, at 104 (Smith).

that employees may request to have their names placed on "transfer registers" for each field office. An attorney will be considered for transfer only for offices for which he or she has asked to be placed on the register. Seniority on a transfer register does not guarantee selection. Stip. ¶ 23. Selecting officials are under no obligation to select the first person on the register. Trans. Vol. III, at 12 (Stack).

23. The 1979 Collective Bargaining Agreement provided that first consideration would be given "to the first 10 employees on the register for that office, provided that the number in this area of first consideration shall be increased by the number of GS-13 and GS-14 employees who are among the top 10 on the register." Stip. ¶ 25. Selections from the area of first consideration cannot give rise to a union grievance. There were no other written guidelines for selection, and the decision seems to be in the discretion of the Associate General Counsel who makes the decision. Trans. Vol. II, at 42-43 (Kobell). Each transfer decision is an independent event. Promotions to GS-14 following transfer generally take two years and are contingent upon there being a GS-14 vacancy in a particular office. Trans. Vol. III, at 39-40 (Stack).

24. There have been 23 field transfers to offices for which plaintiff was on the register. Plaintiff's Exh. 75. At trial plaintiff pointed out 11 transfers to which she thought she was entitled.[11] Trans. Vol. I, at 47 (Smith). Those transfers were given to the following candidates: Amy Krieger, Willy Vance, Eileen Hamamura-Miller, Howard Achtsam, Mark Kachor, Ann Cronin, Joseph Metscher, Melvin Kang, Harriet Levin, Charles Posner, and Robert Ellison. Only five of these transfers—Metscher, Kang, Levin, Posner, and Ellison—were made within 30 days of plaintiff's visit to the EEO counsellor,

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[11] No evidence was submitted by plaintiff as to the other 12 transfers.

or thereafter.[12] Because of the Court's resolution of the continuing discrimination argument raised by plaintiff, *see* pp. 17-20 *infra*, it will not discuss those disputed transfers which occurred before November 15, 1980. Plaintiff submitted no evidence[13] concerning three other transfers which occurred during this period—Nancy Watson, R. Michael Smith, and Louella Nelson. Nonetheless, the defendant presented evidence on these transfers, and the Court will consider them.

25. The transfers of Levin, Posner, Metscher, Kang, R. M. Smith, and Watson were made by Associate General Counsel Stack. Stack was familiar with plaintiff's work and her desire for a transfer because she had come to his office to speak to him on those subjects. Trans. Vol. III, at 8. He had also learned that she had worked in several branches of the Washington office and had not performed well. Indeed, Stack reiterated the persistent criticism of Smith's work:

> The problem with her performance was that she lacked or had the deficiency in analytical skills. She had difficulty identifying issues in complex fact situations.
>
> She had also difficulty applying the law that she knew to the set of facts, and these offices where she had beeen detailed, such as the Advice Branch, none of the people who had reviewed her performance, who had supervised her performance wanted her as a permanent attorney on the staff.

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[12] However, the Court has reviewed the testimony regarding the other transfers and the appraisal files of the successful candidates and finds no discrimination in the transfer decisions. Thus the other transfers do not even provide relevant background on the discrimination issue. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

[13] The "evidence" plaintiff presented as to the other transfers consisted solely of her own testimony that in her opinion she was as qualified or better qualified than the candidates selected.

Id. at 13. Stack also knew of Smith's experience in the Philadelphia Regional Office and spoke to Hirsch about her performance. *Id.* at 14. Moreover, Stack spoke to Gerald Kobell about the interview with Smith and learned that Kobell did not believe that Smith possessed the analytical skills necessary for a field transfer. *Id.*

26. In making transfers Stack placed the highest value on a potential transferee's legal skills, especially legal analysis. Trans. Vol. III at 37-38. All of the selectees possessed "very good to excellent" skills in the areas that Stack valued most; Smith did not. *Id.* at 38. The Court found Stack's testimony convincing [14] and supported by other testimony as well as the appraisal files of the successful selectees. Stack noted that deficiencies in legal skills, especially analysis, if not improved with a few years' experience, are more serious than temporary attitude problems. *Id.* at 23. Stack personally interviewed all selectees.

27. Stack selected Joseph Metscher for the San Francisco Regional Office in December of 1980. The decision was based in part on Metscher's successful detail to the Oakland Regional Office, a detail which resulted in two separate requests from that office that Metscher be given a permanent transfer. Trans. Vol. III, at 18-19. Stack discovered that Metscher had had some attitude problems while assigned to the Advice Branch but concluded that Metscher had superior legal skills and that his attitude problems had disappeared while on detail to Oakland. Stack's conclusions are supported by Metscher's appraisal file. *See* Defendant's Exh. AA-15.

28. Stack selected Melvin Kang for transfer to the Seattle Regional Office in January of 1981. Although

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[14] Stack repeatedly pointed that he focused on an applicant's legal skills, particularly writing and analysis. Trans. Vol. III, at 15 (Kachor), 21 (Metscher), 24-25 (Kang), 31 (Posner), 33 (Levin), 36-37 (R.M. Smith).

Kang had no experience outside the Advice Branch, he had excellent legal skills. Trans. Vol. III, at 24-26. This conclusion is supported by the appraisal file, in which Kang was rated very good to excellent consistently. *See* Defendant's Exh. AA-16. This file is appreciably better than plaintiff's. Even though Smith had had several details and in theory more "experience" than Kang, the Court credits Stack's observation: "What counts when you are talking about someone's experience is what kind of legal skills they demonstrate." Trans. Vol. III, at 26 (Stack).

29. Stack transferred Harriet Levin to the San Francisco Regional Office because of her legal skills. Trans. Vol. III, at 32-33. The Levin appraisal file demonstrates that she developed rapidly as an attorney. Her performance was well above average. Defendant's Exh. AA-17 (Memorandum, dated August 23, 1979). A review of this file reveals her progress to have been substantially better than plaintiff's and supports Stack's stated reasons for selecting Levin for transfer.

30. Stack transferred Charles Posner and Nancy Watson to the San Francisco Regional Office in April 1981. Trans. Vol. III, at 32, 35 (Stack); Defendant's Exh. AA-18, AA-19. Stack was impressed by reports of Posner's excellent legal skills, especially since Posner had only been with the NLRB for a short time. Trans. Vol. III, at 31. Similarly, Watson had an excellent reputation and had always performed well. *Id.* at 34. This impression is sustained by the appraisal files which have glowing accounts of Posner's and Watson's performances. Defendant's Exh. AA-18, AA-19.

31. R. Michael Smith was selected by Stack for transfer to the Seattle Regional Office on April 29, 1981. Mr. Smith had also progressed quickly at NLRB, and had quickly learned how to deal with complex cases. Trans. Vol. III, at 36-37 (Stack). Stack's conclusion is supported by the appraisal file. Defendant's Exh. AA-20.

32. Robert Ellison was transferred to the Albany Office by Gerald Kobell on the basis of Kobell's personal knowledge of Ellison's work, Ellison's excellent recent appraisals, and because Kobell "decided that Ellison had the best potential to develop into a skilled trial attorney." Trans. Vol. II, at 35. Ellison had quick analytical abilities. *Id.* This conclusion is amply supported by Ellison's excellent record. Defendant's Exh. AA-22.

33. Neither plaintiff nor defendant presented any evidence concerning the May 7, 1981 transfer of Luella Nelson to the Oakland Regional Office. However, her appraisal file is in evidence as Defendant's Exh. AA-21. Review of this file demonstrates that Ms. Nelson was clearly a superior candidate for transfer. She was given a Certificate of Commendation for sustained superior performance in August 1980, and her evaluation file demonstrates that her performance had been outstanding. Her record was clearly superior to plaintiff's in this case.

CONCLUSIONS OF LAW

This Court has jurisdiction over this matter under 42 U.S.C. §§ 2000e-5, 2000e-16, Title VII of the Civil Rights Act of 1964 (Title VII), as amended, and 29 U.S.C. § 633a, the Age Discrimination in Employment Act of 1967, as amended (ADEA).

A. *Plaintiff's Continuing Discrimination Claim*

In an Order and Memorandum dated February 11, 1982, the Court refused to dismiss plaintiff's claims of discrimination arising from acts occurring prior to November 15, 1980 in order to give plaintiff an opportunity to prove her allegation of continuing discrimination.[15] *See Shehadeh v. Chesapeake & Potomac Telephone*

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[15] Plaintiff did not make her informal EEO complaint until December 16, 1980. Under 28 C.F.R. § 1613.214(a)(1)(i), a federal employee must contact an EEO counsellor with an informal com-

Co., 595 F.2d 711, 724 (D.C. Cir. 1978). The requirements for establishing a continuing violation of Title VII have been formulated in various ways by the Court of Appeals for this circuit. In *Aikens v. United States Postal Service*, 642 F.2d 514, 516 n.1 (D.C. Cir. 1980), *vacated on other grounds*, 453 U.S. 902 (1981), the Court stated that plaintiff had to show that he was adversely affected by an employment policy or practice that consistently held him in the lower echelons of employment. In the context of the Age Discrimination Act, the Court has stated that a prerequisite to the finding of continuing discrimination is the finding of present violation of the Act. *Marcellaro v. Goldman*, 643 F.2d 813, 816 (D.C. Cir. 1980). In *Milton v. Weinberger*, 645 F.2d 1070 (D.C. Cir. 1981), the court stated that a continuing violation case required a related series of acts, one or more of which falls within the limitation period, *id.* at 1075, or "continuing discrimination, pervasive bias, or unlawful employment practices." *Id.* at 1076. The facts of this case show that the continuing violation theory, no matter how it is framed, is inapplicable to plaintiff's situation.

As will be discussed below, plaintiff has not proved a present violation of either Title VII or the ADEA. Moreover, even assuming a present violation, plaintiff has shown neither a continuing policy or practice of discrimination nor a related series of discriminatory acts. Plaintiff's case rests almost entirely on her own self-serving testimony, which although not particularly credible, depicts an unrelated series of statements made to her which she construed to contain bias towards her on the basis of

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plaint of discrimination within 30 days of the occurrence of "the matter causing him to believe he has been discriminated against." Under the doctrine outlined in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977), failure to comply with the 30-day filing deadline may lead to the dismissal of a Title VII claim.

her sex and age.[16] The only incident which even arguably would suggest a policy of continuing discrimination towards plaintiff was a conversation with her supervisor, Ms. Walsh, who allegedly told Smith that she would never leave LR. Walsh credibly denied making this statement, Higgins later told plaintiff that she could possibly transfer, and subsequent events demonstrated that the NLRB did not have a policy of keeping Smith in LR. Indeed, if anything, the supervisory officials, Higgins and Datz, made a continuing effort to obtain a transfer for plaintiff, even to the point of incurring a union grievance as a result of this policy.

The events which operated to keep Smith from obtaining a transfer were not a "related series." She was given a number of details in the hope that the details would become transfers. Yet the independent evaluation of the supervisors of each detail was that her work was not of the kind that they wanted permanently on their staff. Plaintiff did not charge any of those supervisors or the attorneys who directly supervised her work on these details with discrimination. Moreover, each transfer decision resulted from an independent evaluation by the selecting official. The acts were related in that they all involved Smith, but they did not demonstrate a policy of discriminating against her because of

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[16] The plaintiff's recounting of those statements was uncorroborated by any other evidence and was in all cases refuted by the defendant. However, assuming that certain of these incidents indeed took place, for instance, the statement attributed to Kobell that women Smith's age should not work in the field, plaintiff would have had reasonable cause to suspect discrimination and to go to a EEO counsellor. She did not do so within 30 days of any of the events she recounts. This situation is further reason for not allowing her to proceed with her case on those events occurring before November 15, 1980. In view of the aggressive manner in which Smith consistently pursued her career goals, it is unlikely that she would have allowed statements which she regarded as manifesting discrimination to pass without pursuing EEO remedies.

age or sex. Indeed, other women over fifty have transferred to field offices.

B. *Plaintiff's Title VII Claim.*

To prevail under Title VII, plaintiff must establish that the defendants violated 42 U.S.C. § 2000e-2(a)(1), which provides: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." The standards for determining whether a defendant accused of discriminatory treatment has violated Title VII have been set out in *Texas Department of Community Affairs v. Burdine* (*Burdine*), 450 U.S. 248, 252-56 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 24-25 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); and *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*), 411 U.S. 792, 802-05 (1973). These cases require that a plaintiff first make out a *prima facie* case of discrimination. The burden of going forward with evidence then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employment action taken. Finally, the plaintiff has the burden of showing that the defendant's stated reasons for its actions were a pretext for discrimination. *Burdine, supra*, 450 U.S. at 252-53; *McDonnell Douglas, supra*, 411 U.S. at 802-05. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff. *Burdine, supra*, 450 U.S. at 253.

Plaintiff has barely carried her burden of establishing a *prima facie* case of sex discrimination. She has shown that she applied and was at least marginally qualified for

five transfers [17] and that she was rejected for these transfers in favor of men.[18] Plaintiff's evaluations demonstrate that her work was satisfactory, even if not outstanding. She need not prove for the purpose of her *prima facie* case that she was as qualified or more qualified than those who were transferred. *Aikens v. United States Postal Service*, 665 F.2d 1057, 1059 (D.C. Cir. 1981), *cert. granted*, 102 S. Ct. 1707 (1982). Moreover, the plaintiff need not show discriminatory motive, but only such facts from which the court can infer discriminatory animus. *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 579-80.

On the other hand, the defendant has met his burden of rebutting the inference of discriminatory animus by producing evidence that plaintiff lacked the legal analysis and legal writing skills necessary for a field transfer. Moreover, he showed that plaintiff had failed, during her detail to the Philadelphia office, to demonstrate profi-

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[17] The transfers of Metscher, Kang, Posner, Ellison, and R. M. Smith. Obviously, plaintiff has no claim of sex discrimination as to the Levin, Watson, or Nelson transfers, since the selectees were also women.

[18] Plaintiff has failed to make out a *prima facie* case that she was discriminated against by the supervisory employees who evaluated her work. This issue was belatedly raised in the post trial brief and was only subsidiary at trial. In her trial testimony, she repeatedly admitted that she either did not claim that her evaluators had discriminated against her or had no evidence of discrimination. Only four evaluations were challenged as discriminatory and one of these was written by a woman, Jane Clark. *See* Defendant's Exh. P. The Weiser and Weinbrecht evaluations were overruled by Harold Datz, who attributed no improper motive to their actions and who agreed with what the evaluations said about Smith's performance. Datz' testimony was persuasive. On the other hand, Smith's testimony about the Mirsky evaluation was not credible. The Court has reviewed all the evaluations in evidence and concludes that the evaluations plaintiff challenges are no worse than those she does not challenge and that the women employees of the agency received evaluations that were comparable to those which men received.

ciency at field work. He also demonstrated that those employees who were selected for transfer either had stronger writing and analytical skills than plaintiff or had performed successfully on field details. Finally and most importantly, the defendant showed conclusively that persistent efforts were made to find a suitable position for plaintiff outside LR. The special treatment that plaintiff received was an attempt to help her and was not part of an attempt to discriminate against her.

The plaintiff utterly failed to carry her burden of demonstrating that the articulated reasons for not transferring her were pretexts for discrimination. She offered no credible statistics on the question of sex discrimination, and any irregularities in the evaluation or transfer processes were too minor to cast a cloud of doubt on the defendant's articulated reasons for not selecting Smith. While both the transfer and the evaluation processes were highly subjective and hence subject to close scrutiny by the Court, plaintiff has failed to show that discriminatory results occurred. *See Alexander v. Gardner-Denver Co.*, 519 F.2d 503, 506 (10th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976). Women were selected for three of the eight transfers at issue in this case, and some of those women received glowing evaluations. Plaintiff's lack of success is solely attributable to the absence of the qualities that would have entitled her to a transfer. In sum, plaintiff has failed to prove that she was discriminated against on the basis of her sex.

B. *The ADEA Claim.*

Pursuant to 29 U.S.C. § 623(a)(1), it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The courts have generally applied the case law developed under Title VII in ADEA cases.

Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411-12 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-15 (1st Cir. 1979); *Hodgson v. First Federal Savings & Loan Ass'n*, 455 F.2d 818, 822 (5th Cir. 1972); *Murname v. American Airlines, Inc.*, 482 F. Supp. 135 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (1981), *cert. denied*, 102 S. Ct. 1770 (1982). Consequently, the steps of proving an ADEA case, like those of a Title VII case, consist of the *prima facie* case, the articulation of a nondiscriminatory reason for the decision, and the showing of pretext. *Wilson v. Sealtest Fords Division*, 501 F.2d 84, 86 (5th Cir. 1974). Because of this similarity between the proof of plaintiff's Title VII claim and her ADEA claim, the Court, in the interest of avoiding repetition, will not repeat what is set out above. Certain slight differences in the evidence on the two claims must be pointed out because the ADEA claim goes to all eight of the transfers in question, not just the five that were given to the men.

Plaintiff made out a *prima facie* case under the ADEA. She is within the protected age group, was the victim of an adverse personnel action, was doing satisfactory work, and was not selected for transfers even though younger persons were. This gives rise to an inference that she was a victim of discrimination. Indeed, plaintiff's *prima facie* case of discrimination under ADEA is stronger than her Title VII claim because she showed that no attorney over 50 years of age and eligible for transfer was selected for a field office during the period in question.

The defendant's legitimate nondiscriminatory reason for not selecting plaintiff for the transfers at issue is the same for the ADEA claim as it was for the Title VII claim, and it is no less convincing in the age discrimination context than it was in the consideration of sex discrimination—plaintiff failed to demonstrate adequate legal skill in analysis and writing and did not distinguish herself on her detail to Philadelpiha.

Plaintiff failed to show that the defendant's stated reason for not transferring her was a pretext for age discrimination; indeed, she failed to show that age was even a factor in determining whether she could be transferred. *See Cannistra v. FAA*, 20 E.P.D. § 30,143 (D. D.C. 1979).[19] While no person over 50 years of age was transferred to a field office during the period in question, that fact alone is not enough show pretext.[20] On the other hand, defendant offered statistics, Defendant's Exh. LL, which, while not conclusive of the question whether applicants over 50 were being rejected more often than the others,[21] did indicate that because of the nature of the selection process (applicants were on more than one transfer register, no older applicants were on some registers, and plaintiff was present on a large number of transfer registers) and the small total number of selections, no valid statistical conclusions can be drawn from the selection process. Consequently, she has not shown that defendant discriminated against older persons as a class in the transfer process. This means that plaintiff must rely on other, more direct evidence of pretext. She has offered none, and consequently has failed to prove her case.[22]

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[19] Her only evidence that this factor was considered was the statement she attributed to Gerald Kobell. Her testimony on this subject was not credible.

[20] Plaintiff's evidence did not show whether any persons, other than herself, over the age of 50 were even on the transfer registers during the relevant period.

[21] The statistics defined older applicants as those over 40, not those over 50. The Court is willing to accept plaintiff's definition of the protected class, but notes that this definition makes statistical proof even more imposible. This may explain why plaintiff offered no statistical proof of her own.

[22] Because plaintiff failed to show that she was entitled to a transfer to the field, she cannot be qualified for a field promotion to GS-14. Moreover, even assuming she were qualified for a transfer, the earliest date she could have been transferred would have

C. *The Evaluations.*

The Court of Appeals for this circuit has recognized that a Title VII plaintiff has a right to have appraisals in his or her personnel files removed if those appraisal were the result of discrimination or in reprisal of EEOC activities. *Stoller v. Marsh*, No. 81-1721, slip op. at 10-13 (D.C. Cir. June 22, 1982); *Smith v. Secretary of the Navy*, 659 F.2d 1113, 1118 (D.C. Cir. 1981). Plaintiff contends that several of the evaluations in her file fall under this doctrine, but she has shown neither that the appraisals were the result of discrimination nor, as in *Smith*, constitute reprisal for EEOC activities. The Weinbrecht and Weiser evaluations were left in the file to present a complete picture of plaintiff's performance, and the Court finds nothing improper, much less discriminatory, in this process. Plaintiff claims that the NLRB's use of the Mirsky appraisal violated the collective bargaining agreement, but her testimony on this point was not credible. Similarly, the Court finds no merit in plaintiff's vague allegations about the evaluation by Jane Clark. There is perhaps some merit in the claim that the summary of Smith's career compiled by Datz at Higgins' request was improperly, if accidentally, in Smith's file. However, this document was not compiled with discriminatory animus and was not placed in her file in retaliation for EEO activities; indeed, it was compiled before Smith even approached an EEO counsellor. Moreover, this document was not relied upon in denying any of the transfer requests at issue in this case. Consequently, the plaintiff's evaluation claim is not cognizable under Title VII or the ADEA. The Court will order no relief in this matter.

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been November 15, 1980. Since it takes approximately two years, Trans. Vol. III, at 39-40 (Stack), for a field attorney to quality for promotion to expert status, she would not, in any event, be entitled to promotion at this point in time.

CONCLUSION

The plaintiff has failed to prove that defendant discriminated against her because of sex and age. Indeed, the saga of Florence Smith demonstrates that an agency's special efforts to find the right niche for its employees can sometimes cause more problems than would be caused by no effort at all. Title VII and the ADEA are not all purpose remedies to cure every dissatisfaction experienced by employees. In some instances, there is no way to alleviate every frustration experienced in the work place, and while the Court may sympathize with Ms. Smith's frustration, it cannot, under either Title VII or the ADEA, do anything to remedy the situation. Her real problem is not discrimination but the qualifications of those who were selected instead of her.

/s/ Oliver Gasch
Judge
[OLIVER GASCH]

Date: July 30th 1982

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1747

FLORENCE C. SMITH,
Plaintiff,

WILLIAM A. LUBBERS, General Counsel,
National Labor Relations Board,
Defendant.

[Filed Jul. 30, 1982]

ORDER

Upon consideration of the evidence adduced at trial, the proposed findings of fact and conclusions of law submitted by counsel, and the entire record herein, and for the reasons set out in the accompanying memorandum, it is by the Court this 30th day of July, 1982

ORDERED that judgment in this case be, and hereby is, entered for defendant and against plaintiff.

/s/ Oliver Gasch
Judge
[OLIVER GASCH]